

THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION, et al.,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

Case No. 2:23-cv-01495-JCC

**AMAZON'S REPLY IN SUPPORT OF
MOTION TO COMPEL FURTHER
RESPONSES TO ITS FIRST SET OF
INTERROGATORIES**

1 Plaintiffs' Opposition ("Opp."), ECF 434, to Amazon's Motion to Compel ("Mot."),
 2 ECF 414, only serves to confirm the necessity of this Court's intervention to compel Plaintiffs to
 3 comply with their discovery obligations by serving substantive interrogatory responses.

4 **I. PLAINTIFFS CAN AND SHOULD PROVIDE FACTUAL INFORMATION**
 5 **UNDERLYING THEIR ALLEGATIONS NOW.**

6 Last Friday, the Court heard presentations from the parties concerning the economic
 7 theories raised by Plaintiffs' novel and sweeping lawsuit. Although the parties fundamentally
 8 disagree on the merits, there is no disagreement that this lawsuit squarely puts at issue contested
 9 questions of market definition, pricing and fulfillment practices implemented by Amazon and its
 10 competitors, and the effects on competition of the conduct challenged in the Complaint. Yet
 11 despite this conceded relevance, Plaintiffs still refuse to provide basic facts underlying their
 12 theories in response to interrogatories Amazon served last July.

13 Amazon explained how its interrogatories target fundamental building blocks of Plaintiffs'
 14 claims and seek factual information underlying their allegations. *See* Mot. 4-10. This is
 15 information that Plaintiffs presumably have had since they filed their Complaint. In the main,
 16 Plaintiffs do not disagree that the material Amazon seeks is relevant. They instead erroneously
 17 complain that the interrogatories seek "expert" opinion (they do not) in an effort to defer their
 18 responses, and throw up every possible roadblock to avoid providing factual information. Their
 19 arguments are without merit.

20 Plaintiffs' general concerns about invading expert territory are mistaken. They rely on
 21 *BB&T Corp. v. United States*, 233 F.R.D. 447, 450 (M.D.N.C. 2006), but neglect to mention that
 22 the court there ordered protection from "contention depositions of a party's attorneys" in part
 23 because "a motion to compel answers to the interrogatories was not first pursued," *id.* at 449
 24 (emphasis added). And Plaintiffs find no better support in *FTC v. Kroger Co.*, 2024 WL 2805295
 25 (D. Or. May 31, 2024), because the interrogatories at issue there self-consciously sought expert
 26 testimony. *See id.* at *2 ("[The interrogatory] requests 'all facts, documents, and data,' including

1 economic and legal analysis, that form the basis of plaintiffs’ claim that the proposed merger will
 2 have an anticompetitive effect in supermarket markets.”). Amazon’s interrogatories are nothing
 3 of the sort. The market interrogatories, for example, seek basic facts about the *Plaintiffs’* alleged
 4 markets, such as their participants and market shares.¹ See Mot. 4-6.

5 Amazon is entitled to the factual information in Plaintiffs’ possession—which they
 6 necessarily had to form a Rule 11 basis for their allegations, and certainly obtained in connection
 7 with their four-year pre-Complaint investigation—so that Amazon can take necessary fact
 8 discovery, including from third-party market participants, and its experts can prepare reports based
 9 on evidence in the case. Plaintiffs concede, as they must, that they have some information about
 10 the content of their alleged markets, Opp. 11, yet they have limited their interrogatory responses
 11 concerning the alleged market to the superficial and incomplete overview disclosed in the
 12 Complaint, ECF 415 at 14-15, Resp. No. 1. Rather than providing all factual information in their
 13 possession, they suggest that Amazon should wait and see what facts Plaintiffs disclose in expert
 14 discovery. But such a sequence reverses the ordinary course of discovery and would severely
 15 prejudice Amazon’s ability to pursue necessary discovery and then prepare expert reports that
 16 comprehensively analyze the facts in the case.²

17 Plaintiffs likewise should be compelled to respond to interrogatories concerning the
 18 pricing and fulfillment conduct challenged in the Complaint. With respect to Interrogatory Nos. 4
 19 through 6, concerning alleged price increases, Plaintiffs conflate the concrete elements they must
 20 prove with their obligation to provide “information reasonably calculated to lead to the discovery
 21 of admissible evidence.” *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir.

22 ¹ Plaintiffs argue that the date when Amazon supposedly became a monopolist is “irrelevant” for their
 23 monopoly maintenance claim. See Opp. 12 n.12. Regardless of what Plaintiffs intend to prove in their own
 24 case, Amazon needs the answer to that question in order to understand how Plaintiffs are defining its alleged
 25 monopoly power, so that they can know what it is they are accused of maintaining. If Plaintiffs do not
 26 know, they should say so in response to Amazon’s interrogatories.

² The fact that Amazon has subpoenaed certain, possible competitors, see Opp. 11, is a non-sequitur unless
 Plaintiffs will confirm, in a verified interrogatory response, that those subpoena recipients reflect the totality
 of the alleged markets.

2005) (quotation omitted). To the extent Plaintiffs believe the response lies in voluminous records, they are free to invoke Rule 33(d) and identify specific documents with responsive information. But the fact that there are many documents in discovery, a problem largely of Plaintiffs' own creation, does not excuse them from responding to Amazon's interrogatories.³

Plaintiffs apparently agree that they can and should answer Interrogatory No. 7, which seeks facts underlying Plaintiffs' allegation that components of Amazon's "take rate" are higher than those of its competitors. *See* Opp. 13. The comparison Amazon has requested requires basic addition and subtraction—for example, are referral fees on Amazon higher or lower than referral fees on another channel, and by how much? Plaintiffs' existing response is non-responsive to that question because it consists of outdated, aggregate information that does not allow for the apples-to-apples comparison the interrogatory calls for.

II. AMAZON'S MOTION IS RIPE AND NECESSARY.

Plaintiffs' suggestion that Amazon's motion is not ripe is misguided. Plaintiffs stated in October that they would supplement their responses to just two of Amazon's interrogatories, yet, five months later, they still have not done so. Plaintiffs did not budge further until Amazon explained its conclusion that a motion to compel was necessary.⁴ That does not show that the motion is unnecessary or unripe. To the contrary, it illustrates why after months of refusals by Plaintiffs, moving to compel was the only step that would move things forward.

Moreover, Plaintiffs' offers to "supplement" are caveated with continued objections on relevance, numerosity, prematurity, and other grounds. *See* ECF 415, at 48. As explained here

³ Plaintiffs' assertion that interrogatories requesting information about price increases (Nos. 4 & 5) call for expert testimony is wrong. Opp. 10. Amazon seeks "the material or principal facts which support [Plaintiffs'] contentions" concerning purported effects of the alleged conduct. *In re Urethane Antitrust Litig.*, 2009 WL 2058759, at *2 (D. Kan. July 15, 2009) (citation omitted). "Although plaintiffs' expert *may* identify additional price-increase announcements that support plaintiffs' claims, plaintiffs may not shirk their duty of answering [interrogatories] now with whatever information they have." *Id.* (citation omitted; emphasis in original).

⁴ *Compare, e.g.*, ECF 435-2, at 2 (asserting in late January that "Plaintiffs have satisfied their obligations to answer interrogatory number 1 at this time."), *with* ECF 414 at 3 n.3 (explaining that Plaintiffs had finally offered to respond to that interrogatory only after Amazon said it was moving to compel).

1 and in Amazon’s opening motion, these objections are meritless. Moreover, while Plaintiffs have
 2 said that their experts are continuing to evaluate the answer to that question, that does not relieve
 3 them of the obligations to have an existing factual basis for their allegations and to identify that
 4 basis in discovery. *See* Fed. R. Civ. P. 11; Mot. 2.

5 **III. AMAZON’S INTERROGATORIES ARE NOT OVERLY NUMEROUS.**

6 Plaintiffs argue that they are “seek[ing] the application of consistent rules for both sides”
 7 regarding how interrogatories count toward the overall limit of 40. Opp. 3. Yet, their argument
 8 that the Court should follow an objection that Amazon made in December 2023 and later did not
 9 press, *id.*, shows that is not the case. While it is true that Amazon objected to Plaintiffs’ first
 10 interrogatory as being excessively compound (because it asked Amazon to justify over 100 alleged
 11 facts), *id.*, the parties resolved that objection and Amazon agreed to count a re-stated version of
 12 the interrogatory as containing just six discrete inquiries. Plaintiffs have since served other
 13 interrogatories with multiple sub-parts that could easily be counted as exceeding 40
 14 interrogatories—and yet Amazon answered them as well. A “consistent” rule would be for
 15 Plaintiffs to (finally) do the same.

16 There is also no mystery as to why Amazon counts Interrogatory No. 9 as containing six
 17 distinct inquiries, but all others as containing one each. Opp. 6. Interrogatory No. 9 is the mirror
 18 image of Plaintiffs’ Interrogatory No. 1, and it therefore logically covers the same number of topics
 19 and should be counted equally. The other interrogatories are different because they all target
 20 specific, individual subject matter and thus relate to a “common theme.” Mot. 11-12. Amazon’s
 21 Interrogatory No. 3 asks Plaintiffs to provide information concerning alleged “coercion” by
 22 Amazon “involving its order fulfillment business,” No. 7 asks Plaintiffs to describe the fees and
 23 costs that they believe are assessed at a lower rate to sellers in other retail channels, and No. 8
 24 seeks information about claimed “barriers to entry” that exist for Plaintiffs’ alleged relevant
 25 markets.

Plaintiffs agree that Amazon’s motion cites the correct legal standard. Mot. 10; Opp. 4. But they misapply that caselaw by parsing interrogatories into multiple closely-related questions and labeling them all “distinct.” Opp. 4-5. That is not how courts apply this standard, as Amazon’s citations showed. Mot. 11 (citing cases that counted multiple inquiries on a common theme to count as just one interrogatory).⁵ For example, Interrogatory No. 3, mentioned above, asks Plaintiffs to identify persons, products, fulfillment providers, and dates relevant to each instance of alleged “coercion.” ECF 415 at 17-18, Interrog. No. 3. Plaintiffs claim this constitutes “four separate questions,” presumably because Amazon asked for four logically-subsumed components of each occurrence of alleged coercion. But Plaintiffs’ cases refute their request to atomize Amazon’s interrogatories.⁶ See *Paananen v. Cellco P’ship*, 2009 WL 3327227, at *3 (W.D. Wash. Oct. 8, 2009) (cited in Opp. 3) (“This interrogatory also only inquires into one distinct area: Verizon’s backup procedures. The types of media storage, their size and brand, which computers are backed up, and the timing of those backups are all secondary inquiries subsumed within the primary inquiry.”).

IV. INTERROGATORIES NO. 9, 13, AND 16 ARE NOT “PREMATURE.”

Plaintiffs’ argument that three of Amazon’s requests are “premature,” Opp. 7, at this stage more than a year into discovery, lays bare their efforts to stall their own discovery obligations. The FTC has been in possession of discovery from Amazon since 2019. Plaintiffs filed their Complaint four years later, while in the possession of millions of pages of documents and dozens of deposition transcripts. Discovery has been underway in the case itself for more than a year,

⁵ Plaintiffs argue that Amazon has not explained that position, Opp. 6, but to the contrary, it did so by letter on October 15, in a telephonic meet and confer held on October 18, and in a subsequent email sent on December 18.

⁶ Likewise, Interrogatory No. 7 targets the subject of fees charged by other retailers and includes “secondary inquiries”—the fee or cost, its amount, and third parties with knowledge of facts relating to Plaintiffs’ allegations about seller fees—that are not separate interrogatories. And Interrogatory No. 8 seeks subsidiary information—potential entrants, the “barrier” that prevented each from coming to market, and an explanation of how each prospective entrant was prepared to launch—bearing on the distinct topic of barriers to entry.

1 with Amazon producing millions more pages of documents. Plaintiffs have had years to discover
 2 the bases for their claims, and to contemplate what remedies they intend to seek if they succeed in
 3 proving their claims.⁷ Indeed, Plaintiffs asked for a vague set of remedies when they filed the
 4 Complaint more than a year ago, and Amazon is simply asking them to say what that meant so that
 5 they can take discovery into the feasibility of any proposed remedies (No. 16), or less restrictive
 6 means (Nos. 9 and 13).⁸

7 Plaintiffs' principal justification for shirking their obligation to answer these three
 8 interrogatories is that they have served massive discovery of Amazon. *See* Opp. 7-9. But
 9 Amazon's considerable efforts to produce millions of pages of documents in response to nearly
 10 400 requests for production only reinforces that Plaintiffs must now perform their corresponding
 11 duty to answer Amazon's much more limited requests of them. The substantial material available
 12 to Plaintiffs makes their reliance on *eBay*, in which the court refused to compel responses to
 13 contention interrogatories before document productions had even begun, misplaced. 2008 WL
 14 5212170, at *2 (N.D. Cal. Dec. 11, 2008).

15 Finally, Plaintiffs complain that interrogatories going to less-anticompetitive alternatives
 16 or potential remedies are "irrelevant." *See* Opp. 8-9. Even if Plaintiffs were correct that they need
 17 only show one or some less anticompetitive alternatives to prevail under rule of reason analysis,
 18 that does not relieve them of their obligation to disclose in discovery all facts in their possession
 19 about such less anticompetitive alternatives. Amazon, like Plaintiffs, is entitled to discovery of
 20 any information "relevant to any party's claim or defense and proportional to the needs of the
 21

22 ⁷ Moreover, "straightforward 'factual' contention interrogatories should be answered earlier in the
 23 discovery process." *In re Allergan, Inc. Securities Litig.*, 2016 WL 10719393, *3 (C.D. Cal. Sept. 23, 2016)
 (quotation omitted).

24 ⁸ Plaintiffs' objection is particularly unfounded for Interrogatory No. 9 since Amazon told them its
 25 competitive justifications last July and recently supplemented that response to provide even more
 26 information. And Plaintiffs ignore that they urged the Court that "fact discovery should encompass both
 liability and remedy issues," Mot. 10 (quoting ECF 167), only to turn around the next year and refuse to
 provide remedies discovery.

case,” Fed. R. Civ. P. 26(b)(1); *see* Fed. R. Civ. P. 33(a)(2), and its discovery rights are not limited by how Plaintiffs might or might not choose to present their case at trial.

V. PLAINTIFFS DELIBERATELY MISREAD INTERROGATORY NO 2.

Interrogatory No. 2 asks Plaintiffs, “[f]or each purported ‘anti-discounting tactic’ alleged in Your Complaint, Identify each and every Third Party You know or have a reason to believe has also engaged in one or more of the same or similar ‘tactics.’ See, e.g., Am. Compl. ¶¶ 7, 229, 259, 414, 415.” Plaintiffs’ response essentially is that “no one” engages in any tactic similar to those alleged because “no one” else is a monopolist. *See* ECF 415 at 15-17, Resp. No. 2. That is plainly non-responsive to the interrogatory posed, and improperly presumes that Plaintiffs will prove their claims. Plaintiffs are free to make whatever legal argument they want about the consequence of other market participants engaging in similar conduct, *see* Opp. 15, but, for purposes of fact discovery, they must answer the interrogatory as written.

CONCLUSION

Amazon respectfully requests that its motion to compel be granted.

DATED this 12th day of March, 2025.

Respectfully submitted,

I certify that this memorandum contains 2,416 words, in compliance with the Local Civil Rules.

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